



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 20, 2020

Via e-mail (commissioner@tea.texas.gov)

The Honorable Mike Morath
Commissioner of Education
Texas Education Agency
1701 N. Congress Avenue
Austin, Texas, 78701

Dear Commissioner Morath:

This letter provides informal guidance in response to your question concerning the extent to which cities and counties may restrict essential services allowed under the Governor's executive order issued in response to the novel coronavirus disease 2019 (COVID-19). See Executive Order GA-16 (Apr. 17, 2020) (hereafter GA-16). In particular, your question asks whether local shelter-in-place orders may prohibit teachers and staff from accessing public school buildings to perform essential services. We conclude that the Governor's order supersedes conflicting local orders that restrict essential services, including those performed by teachers and school staff.

On March 13, 2020, Governor Abbott declared a state of disaster in all Texas counties in response to the novel coronavirus disease 2019 (COVID-19), authorizing the use of all available State and local resources that are reasonably necessary to cope with the disaster. The Governor of the State of Texas, Proc. of Mar. 13, 2020. On April 12, 2020, Governor Abbott extended his disaster declaration for all Texas counties. The Governor of the State of Texas, Proc. of Apr. 12, 2020. Subsequently, Governor Abbott issued an executive order to enable the safe, strategic reopening of select services in response to the COVID-19 disaster. GA-16 (Apr. 17, 2020). Importantly, this order provides that it "shall supersede any conflicting local order . . . to the extent that such a local order restricts essential services or reopened services allowed by [GA-16] or allows gatherings prohibited by [GA-16]." *Id.* at 4.

The Texas Disaster Act of 1975 (the Act) authorizes the Governor to declare a state of disaster if a disaster has occurred or the threat or occurrence of a disaster is imminent. TEX. GOV'T CODE § 418.014(a). The Act expressly permits the Governor

to “issue executive orders, proclamations, and regulations, and amend or rescind them.” *Id.* § 418.012. Importantly, the Act provides that the Governor’s “orders, proclamations, and regulations have the force and effect of law.” *Id.*; see also *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *7 (5th Cir. Apr. 7, 2020) (recognizing state authority to implement emergency measures during a public health crisis).

Generally, local action cannot be inconsistent with the Texas Constitution or general law. See TEX. CONST. art. XI, § 5(a); see also *City of Laredo, Tex. v. Laredo Merchants Assoc.*, 550 S.W.3d 586, 592 (Tex. 2018) (recognizing municipal ordinances may not be inconsistent with the Constitution or state law); Tex. Att’y Gen. Op. KP-0296 (2020) (concluding municipal and county officials lack emergency authority to regulate or restrict the sale of firearms). Limitations on local authority may be express or implied. *City of Laredo*, 550 S.W.3d at 593. Yet a local restriction “ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable.” *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). “Absent an express limitation, if the general law and local regulation can coexist peacefully without stepping on each other’s toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency.” *City of Laredo*, 550 S.W.3d at 593.


GA-16 expressly limits local authority. The order provides that it “shall supersede any conflicting local order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services or reopened service allowed by this executive order or allows gatherings prohibited by this executive order.” GA-16 at 4. As an express limitation on local restrictions involving essential or reopened services and gatherings, a court would likely conclude that GA-16 controls. Thus, GA-16 forbids conflicting local orders that restrict essential or reopened services or allow prohibited gatherings. See *City of Laredo*, 550 S.W.3d at 598 (recognizing that local governments are forbidden from regulating subject matter where local control has been rescinded). Nevertheless, GA-16 does not supersede local restrictions that do not conflict with the order. See GA-16 at 4. Thus, local restrictions that are adopted pursuant to lawful authority and consistent with GA-16 may be enforced.

Here, GA-16 recognizes that teachers and school staff provide essential services. The order further provides that these individuals “may return to schools to conduct remote video instruction, as well as perform administrative duties, under the strict terms required by the Texas Education Agency.” GA-16 at 4. In addition, GA-16 incorporates the federal guidance that identifies critical infrastructure and essential workers, GA-16 at 3, which includes “[e]ducators supporting public and private K–12 schools, colleges, and universities for purposes of facilitating distance learning or performing other essential functions.” U.S. Dep’t of Homeland Security, Cybersecurity & Infrastructure Security Agency, *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19*

Response, Apr. 17, 2020, at https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_2.pdf. Therefore, to the extent teachers and school staff are performing essential services, such as conducting remote video instruction or performing other essential administrative duties, GA-16 supersedes conflicting local orders that restrict these services.

Please note that this response is not an official opinion of the Office of the Attorney General issued under section 402.042 of the Texas Government Code, nor is it an exhaustive memorandum of law; rather, it is an informal letter of legal advice offered for the purpose of general guidance.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Vassar', with a long horizontal flourish extending to the right.

Ryan M. Vassar
Deputy Attorney General for Legal Counsel